

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2007

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. VOLOVSEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County:
MICHAEL W. BRENNAN, Judge. *Affirmed.*

VERGERONT, J.¹ William Volovsek, proceeding pro se, appeals from a judgment finding that he violated § 29.09(1), STATS., which prohibits hunting without a license, based on a plea of no contest. The judgment imposed a civil forfeiture of \$600 plus costs and revoked privileges under Chapter 29,

¹ This appeal is decided by one judge pursuant to § 752.31(2)(g), STATS.

STATS., for one year. Volovsek contends that his attorney did not present an available defense on his behalf, misinformed him about the amount he could be fined, pleaded no contest against his wishes, and that had he understood the potential fine, he would have gone ahead with a jury trial. For the reasons we explain below, we affirm the judgment.

The proceeding began with the State filing a summons and criminal complaint alleging that Volovsek hunted deer without a license contrary to § 29.09(1), STATS. The penalty for this violation is a fine of not less than \$1,000 nor more than \$2,000, or imprisonment for not more than six months, or both, and no license. *See* § 29.99(11), STATS. The State also cited Volovsek for transporting an uncased gun on a four-wheeler.

Pursuant to an agreement with the prosecutor, the State reduced the charge under § 29.09(1), STATS., from a criminal charge to a civil forfeiture and dismissed the citation. Volovsek entered a no contest plea to the § 29.09(1) charge. After hearing argument about the appropriate amount of the fine, the court imposed a fine of \$600 plus costs, a loss of license for one year, and entered a judgment accordingly.² It appears from the record that Volovsek did not file any motion before the trial court to set aside the plea and judgment before filing this appeal.

² The complaint and § 29.99(11), STATS., set the fine for hunting deer without the required approval between \$1,000 and \$2,000. However, the prosecutor stated that the maximum fine was \$1,000, defense counsel did not dispute that, and the court imposed a fine of \$600. If a penalty section other than § 29.99(11) applied after amendment from a criminal violation of § 29.09(1), STATS., to a civil forfeiture, the parties did not cite that section below and do not on appeal. However, it is not necessary to resolve this issue on this appeal.

The State construes Volovsek claim as one of ineffective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668 (1984), and argues that, under *State v. Machner*, 92 Wis.2d 797, 804 n.1, 285 N.W.2d 905, 908 (1979), Volovsek may not appeal this issue without first requesting a hearing before the trial court at which he presents his trial counsel as a witness. Volovsek does not respond to this argument. The right to effective assistance of counsel flows from the right to counsel in criminal proceedings guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 7 of the Wisconsin Constitution. *See State v. Smith*, 207 Wis.2d 259, 274, 558 N.W.2d 379, 386 (1997).

We will assume without deciding that the right to effective assistance of counsel applies here insofar as the challenged conduct of trial counsel occurred in the criminal proceeding and it was that conduct that resulted in the conversion to a civil forfeiture action.³ The State is correct that a prerequisite to appellate review of a claim of ineffective assistance of counsel in the trial court is that the defendant raise the issue before the trial court and “preserve the testimony of trial counsel.” *Machner*, 92 Wis.2d at 804, 285 N.W.2d at 908. The reason is that the reviewing court is unable to determine whether conduct of trial counsel was deficient without an explanation from trial counsel about the reasons for the conduct. *Id.*

Based on the record before us, it appears that not only did Volovsek not present the testimony of trial counsel to the trial court, but he did not bring any

³ Actions to recover forfeitures for violations of § 29.09(1), STATS., are civil actions, *see* § 23.50(1) and (2), STATS., therefore, the Sixth Amendment right to effective counsel in criminal proceedings would not apply.

motion before the trial court after the entry of judgment. We therefore are unable to review his claim of ineffective assistance of counsel. To the extent he wishes to withdraw his plea on grounds other than ineffective assistance of counsel, the absence of a motion in the trial court requesting this relief also precludes us from reviewing those claims. Whether we view the proper procedure for such motions as that applicable to civil actions, *see* § 806.07, STATS.,⁴ or that applicable in criminal proceedings, *see* § 23.50(4), STATS., a prerequisite to our review is a motion seeking this relief in the trial court and a record of the trial court proceedings on the motion. We therefore must affirm the judgment. In doing so, we do not decide what procedures, if any, are available at this time to Volovsek in the trial court. We recognize that he is pro se, but in the absence of any discussion in the parties' briefs on the applicable trial court procedure (beyond the State's point about *Machner*) and given the ambiguities that this record presents, we are unable to provide more direction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

⁴ The rules of §§ 801.01 to 847, STATS., apply to civil actions, unless otherwise prescribed by statute. Sections 801.01(2) through § 806.07 govern relief from judgment in civil actions, and permit a court to grant relief from a stipulation or judgment based on a number of specified grounds, including mistake, surprise or excusable neglect, § 806.07(1)(a), and for any other reasons justifying relief, § 806.07(1)(h), as long as the motion is brought within the time periods set forth in § 806.07(2).

